

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
CLAIM #G(W)118417-76H BY DANIEL L.)
BARGFREDE)
FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 26, 1997, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application to Change Appropriation Water Right G(W)118417 by Daniel L. Bargfrede is denied.

NOTICE


The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for

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certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 27th day of October, 1997.


Jack Stults, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 28th day of October, 1997, as follows:

Daniel L. Bargfrede
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Victor, MT 59875

Hertha Lund
Datsopoulos, MacDonald
& Lind, PC
201 W. Main, Suite 201
Central Square
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Curt Martin, Manager
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Walter J. & Cheryl Smith
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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P O Box 201601
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Diane McDuffie
Hearings Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR CHANGE OF)	PROPOSAL
APPROPRIATION WATER RIGHT)	FOR
G(W)118417-76H BY DANIEL L.)	DECISION
BARGFREDE)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 16, 1997, in Hamilton, Montana, to determine whether an authorization to change appropriation water right should be granted to Daniel L. Bargfrede (Applicant) for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1995).

APPEARANCES

Daniel L. Bargfrede (Applicant) appeared at the hearing pro se. Jean Bargfrede, appeared at the hearing as a witness for Applicant.

Walter J. (Butch) and Cheryl Smith (Objectors) appeared at the hearing in person and by and through counsel, Hertha Lund.

Lee Yelin, Water Rights, Inc.; Melvin Gaudin, local resident; and William A. Groff, former owner of Applicant's

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by Daniel L. Bargfrede

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property, appeared at the hearing and were called to testify by Objectors.

Karl Uhlig, Water Right Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing and was called by Applicant.

EXHIBITS

Applicant offered no exhibits for the record.

Objectors offered 15 exhibits for the record.

Objectors' Exhibit 1 consists of two pages which are field notes taken September 17, 1957, during the water resources survey. These two pages deal specifically with the Groff water rights which involves the water rights claimed that are the basis of this change.

Objectors' Exhibit 2 is a one-page letter to Mary Sage from Cheryl Smith dated March 10, 1997, which discusses whether the land now owned by Applicant was irrigated during the period when the Sages owned it. Mrs. Sage's response is on the bottom of the letter.

Objectors' Exhibit 3 consists of three pages of a soil survey. The pertinent portion of the first page is the description of the Bass-Ravalli loams, sloping and strongly sloping. The second page discusses the Bitterroot series soils.

The third page is a soils map which includes Applicant's claimed place of use.

Objectors' Exhibit 4 is an infrared aerial photograph taken July 26, 1975. Red is wet and green is dry. The pertinent part is outlined in blue ink. This exhibit was accepted on the basis that it proves the property was not irrigated at that time, but could have been irrigated earlier or later.

Objectors' Exhibit 5 consists of two pages, copies of aerial photographs taken in 1971. The pertinent portion is outlined in black ink on first page. The second page is unmarked. Applicant objected to this exhibit on the basis the aerial photo proves the property was not irrigated at that time; that it could have been irrigated earlier or later. This objection is overruled. A person experienced in interpretation of aerial photographs such as Department employees can, by examining the photograph, determine whether it has been irrigated in the past.

Objectors' Exhibit 6 is a copy of an aerial photograph taken July 21, 1955. The pertinent part of this exhibit shows a portion of a ditch in blue ink.

Objectors' Exhibit 7 is a blue copy of an aerial photograph taken in 1975. The pertinent part of this photograph is outlined in black ink. Applicant objected to this exhibit.

Objectors' Exhibit 8 is a copy of an aerial photograph taken in 1940. The pertinent portion of this photograph is outlined in blue ink. Applicant objected to this exhibit.

Objectors' Exhibit 9 is a blue copy of an aerial photograph taken in 1975. Applicant objected to this exhibit.

Applicant's objection to Objectors' Exhibits 7, 8, and 9 was based on relevancy to this case. The Hearing Examiner finds these exhibits are relevant to this case by establishing the length of time the water right has not been used. Therefore the objections are overruled and the exhibits are accepted into the record.

Objectors' Exhibit 10 is an enlarged copy of a portion of page 27 of the *Water Resources Survey, Ravalli County*. The pertinent portion is in the NW $\frac{1}{4}$ of Section 36 where the No. 4 Ditch services the Bargfrede property.

Objectors' Exhibit 11 is an ownership history, from 1932 to the present, of Applicant's claimed place of use.

Objectors' Exhibit 12 is a USGS Quadrangle map, Victor Quadrangle, completed in 1967.

Objectors' Exhibit 13 is a copy of a letter to whom it may concern from Kathy Wilhelm. Ms. Wilhelm states that the 20 acres Applicant claims as a place of use have not been irrigated since she became a resident of her property in 1972. Ms. Wilhelm

further states in the letter that she has experienced a shortage of water and fears any additional uses on the ditch would impact her water use. Applicant objected to this exhibit on the basis that she should have filed an objection to the application if she had a shortage of water. Objection overruled. This exhibit has value as further proof the water has not been used for a long period of time and there may be a shortage of water.

Objectors' Exhibit 14 is a photograph showing the flow of the ditch as it crosses Objectors Smith's property. It indicates where the water was a month ago and how much it dropped in the interim. This photograph was taken by Butch Smith on May 15, 1997. Applicant objected to this exhibit.

Objectors' Exhibit 15 is a photograph showing the flow of the ditch as it flows between the road and barn on Smiths' property. This photograph was taken by Butch Smith May 15, 1997. Applicant objected to this exhibit.

The objection to Objectors' Exhibits 14, and 15 was the photographs did not prove anything. The Hearing Examiner finds the photographs have value by providing her with a visual concept of the ditch used by Butch Smith. The objection is overruled.

PRELIMINARY MATTERS

Applicant objected to a portion of Mr. Smith's testimony that indicated Applicant had not followed the proper process when

Applicant, prior to selling a 12.5 acre parcel of land, obtained an easement to allow Applicant to establish a pump site and transport the water to the place of use. The objection is sustained. That particular part of Mr. Smith's testimony is not relevant to the present matter and therefore is given no weight by the Hearing Examiner in finding the facts, reaching the conclusions, and proposing the order in this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(W) 118417-76H in the name of and signed by Daniel L. Bargfrede was filed with the Department on July 26, 1996. (Department file.)

2. Pertinent portions of the application were published in the *Ravalli Republic* on January 2, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. One objection to the proposed change was received by the Department. Applicant was notified of the objection by a letter from the Department dated February 20, 1997. (Department file.)

3. Applicant seeks to change the point of diversion of a portion of water right claimed by Statement of Claim 76H-W118417 filed by Lou Sage on February 24, 1982. The point of diversion would be changed from the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ to the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 8 North Range 21 West, Ravalli County, Montana. (Department file and testimony of Dan Bargfrede.)

4. Applicant has provided a preponderance of evidence he has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property where the water would be put to beneficial use. (Department file.)

5. Irrigation is a beneficial use of water. Applicant wishes to irrigate the property known as "Knapweed Hill" to rid the property of knapweed. (Testimony of Applicant and Jean Bargfrede.)

6. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

7. Applicant has not proved by a preponderance of evidence the proposed diversion, construction, and operation of the appropriation works are adequate. There are references in the file that appear to relate to a sprinkler system with 34 heads,

11/16th nozzles, and a ten horsepower Cornell pump; however, without further explanation, one can only guess at the delivery system, construction, and operation of the appropriation works. Even when Hearing Examiner prompted Applicant, he offered no other evidence concerning the adequacy of the means of diversion, construction, or operation of the appropriation works.

(Department file and testimony of Applicant.)

8. Applicant failed to provide a preponderance of evidence there would be no adverse effect to other water rights. Applicant offered no evidence demonstrating there is sufficient water in Kirchner Slough at the proposed new point of diversion to supply his demand and the demands of other water users without creating an adverse effect to the other users. There was testimony there may be sufficient water at certain times of the year and vague references to when others were using Kirchner Slough as a natural carrier there would be more water in the slough. However, none of this evidence was sufficient to meet the burden of proof that there would be no adverse effect to water rights of other persons. (Testimony of Karl Uhlig and Applicant and Objectors' Exhibit 13.)

There are no planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-402 (1995).

2. Applicants have not met the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 7 and 8.

Based upon the forgoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

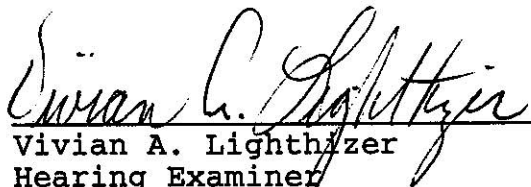
Application to Change Appropriation Water Right G(W)118417 by Daniel L. Bargfrede is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the

precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 25th day of September, 1997.


Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 26th day of September, 1997, as follows:

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by Daniel L. Bargfrede

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